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In the Supreme Court of the United States

OCTOBER TERM, 1998

KORDICE M. DOUGLAS,
PETITIONER

VERSUS

DYNMCDERMOTT PETROLEUM
OPERATIONS COMPANY, ET AL
RESPONDENT

On Petition For Writ of Certiorari to The
United States Court of Appeals For
The Fifth Circuit

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

VICTOR R. FARRUGIA
A PROFESSIONAL LAW CORPORATION
228 St. Charles Avenue
Suite 1028
New Orleans, LA 70130-2610
(504) 525-0250

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

13 pp

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS.....i

TABLE OF AUTHORITIES.....ii

I. **Douglas Did Not Breach Her Ethical Duty to DPO Because DPO Contractually Waived its Rights of Confidentiality for Documents generated by DPO under its contract with DOE**.....1

II. **The Fifth Circuit Opinion Abandons the Balancing Test Used by the Majority of the Circuits**.....6

III. **Conclusion**.....9

TABLE OF AUTHORITIES

CASES **Page**

Boeing Company v. Shipman, 411 F.2d 365 (5th Cir. 1969).....2,3

Doe v. A. Corp., 709 F.3d 1043 (5th Cir. 1983).....4

Douglas v. DynMcDermott Petroleum, 144 F.3d 364 (5th Cir. 1998), filed on June 18, 1998.....1,5

Douglas v. DynMcDermott Petroleum, dissent, filed on December 15, 1998 at 1998 WL 870350 (5th Cir. 1998).....*passim*

Gifford v. Atchison, Topeka & Santa Fe Ry., 685 F.2d 1149 (9th Cir. 1982).....5

Hochstadt v. Worcester Foundation for Experimental Biology, 545 F 2d 222 (1st Cir. 1976).....7

Laughlin v. Metropolitan Washington Airports Authority, 149 F.3d 253 (4th Cir. 1998).....7

O'Day v. McDonnell Douglas Helicopter Co., 79 F.3d 756 (9th Cir. 1996).....7

Polk v. Yellow Freight Syst., Inc., 801 F.2d 190 (6th Cir. 1981).....5

Rhodes v. Guiberson Oil Tools, 75 F.3d 989, 993 (5th Cir. 1996) (en banc).....1,2

STATUTES

Ethical Rule 1.6.....4

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

NOW INTO COURT comes Petitioner, Kordice M. Douglas (hereafter "Douglas"), and files a Reply to Respondents DynMcDermott Petroleum Operations Company (hereafter "DPO") and John Poindexter (hereafter "Poindexter")'s Brief in Opposition to Petition For Writ of Certiorari. DPO and Poindexter have made several arguments in opposition to the Petition which Douglas will now address.

I. Douglas Did Not Breach Her Ethical Duty to DPO Because DPO Contractually Waived its Rights of Confidentiality for Documents generated by DPO under its contract with DOE

The Fifth Circuit's obligation was to review the jury verdict under the standard of *Rhodes v. Guiberson Oil Tools,* 75 F. 3d 989, 993 (5th Cir. 1996) (en banc), which held that in a *McDonnell Douglas-Burdine* case, the jury verdict must be tested for sufficiency of evidence under the standard of *Boeing v. Shipman,* 411 F.2d 365 (5th Cir. 1969) (en banc). The panel instead, has breached that duty by disregarding the *McDonnell Douglas* framework, refusing to determine whether the jury could have reasonably found for the plaintiff based on the evidence it saw and heard. "The panel found the facts of the case *de novo,* and applied its own new mandatory rules of law to those facts." Judge Dennis's dissent, p. 24, filed on December 15, 1998 at *1998 WL 870350* (5th Cir 1998) (hereafter "Dennis Dissent"), which dissented from the majority opinion by Judge Jolly in *Douglas v. DynMcDermott Petroleum, 144 F3d 364* (5th Cir. 1998), filed on June 18, 1998. The dissenting opinion of Judge Dennis was joined by Judge Parker. Chief Judge Politz, Judges Benavides and Stewart would grant rehearing en banc to address the important and substantive issues identified in Judge Dennis's

dissent. Also in his dissent, Judge Dennis states:

> Instead of following controlling precedents, the panel opinion uses a free-wheeling, legislative-like balancing process to fashion a mandatory rule of law, viz., any employee who is a lawyer loses Title VII protection when she reveals any employment-related information while opposing an unlawful employment practice; and **proceeds to apply this rule to facts found by the panel itself** directly from the record, in complete disregard of the panel's duty to test the jury verdict under our *Boeing v. Shipman* standard as required by our en banc decision in *Rhodes*.

Dennis Dissent at 1 (emphasis added). As the District Court stated in its Order and Reasons, "The jury in this case was attentive and specific." Petition for Writ of Certiorari, Appendix B-5. The jury decided that Douglas was fired because of engaging in the protected activity of complaining about gender and race discrimination. However, both the panel opinion and DPO have set forth a different version of the facts.

Most importantly, DPO agrees with and emphasizes the panel's opinion that the Douglas violated her ethical duties to DPO. The panel in this case should not be making a fact determination that Douglas has breached her ethical duties to DPO because the jury has been given the evidence of the Louisiana Code of Professional Responsibility, considered all the evidence presented at trial, determined the credibility of the witnesses, and has reached the opinion that the company's explanation that Douglas breached an ethical duty was a pretext to retaliation under the *McDonnell Douglas-Burdine* analysis. There is sufficient evidence to support the jury verdict on this issue.

First, DPO asserts that Douglas improperly revealed

confidences. DPO states that "the petition concedes that confidences were revealed." However, the Petition (p. 7) clearly states (twice) that the subject matter of the Douglas's communications were routine business matters which "did not concern [or involve] any sensitive or confidential matter."

Under the *Boeing Company v. Shipman* standard, a jury verdict must be tested for sufficiency of the evidence. 411 F.2d 365 (5th Cir. 1969) (en banc). The most significant piece of evidence for whether Douglas revealed confidences of privileged information is the contract between DPO and DOE. As Circuit Judge Dennis pointed out in his dissenting opinion:

> The government's contract between the DOE and DPO provided that "**[a]ll records acquired or generated by the contractor [DPO] under this contract** in the possession of the contractor, including [performance appraisals, reviews, and associatd documents, equal employment opportunity and affirmative action claims and records, files and records concerning ethics and security investigations, and **attorney-client privilege or attorney work product] shall be subject to inspection, copying, and audit by the government at all reasonable times**[.]" "Emphasis added." Therefore, the DPO expressly waived its rights of confidentiality and privilege with respect to these documents.

Dennis Dissent, p. 3. The Fifth Circuit stated that the relationship between DOE and DPO was "purely contractual and at arm's length." This contract explicitly waived any rights of DPO of confidentiality and privilege with respect to the Response Letter of Douglas to her performance Evaluation, which was given to O'Neill of DOE.

Assuming, *arguendo,* that the substance of Douglas's

communication wth DOE constituted confidential information, DPO states that there is no exception under the bar rules which covers her conduct. Particularly, DPO states that Douglas "was not within the scope of rule 1.6 (b) (2) when she unilaterally revealed client confidences." Opposition, p. 10.

In light of the contract language, it is clear that Douglas did not "unilaterally" reveal anything. Rule 1.6 prohibits disclosure "unless a client consents after consultation." DPO is a sohisticated business entity with a lengthy contract which includes an explicit waiver of normally privileged information with respect to DOE.

In addition, Rule 1.6(b) allows a lawyer to make disclosures "to the extent the lawyer reasonably believes is necessary...(b) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client..." In *Doe v. A Corporation*, 709 F.2d 1043 (5th Cir. 1983), the court held that a lawyer does not forfeit her rights simply because to prove them she must utilize some confidential client information. The Fifth Circuit's interpretation of Rule 1.6 is in conflict with its own and other circuits' precedent.

> The panel opinion further disadvantages every Louisiana attorney having a dispute with any client by incorrectly interpreting [Rule 1.6] to require that the attorney must file a formal administrative or judicial complaint before there can be a "controversy" with the client that would allow the lawyer to reveal confidential information necessary to the enforcement or defense or the lawyer's own personal rights."

Dennis dissent, p. 34. When Douglas gave a copy of her Response Letter to O'Neill, the officer in charge of taking complaints of discrimination at the DOE, she was establish-

ing a claim of discrimination on her behalf because of the controversy between herself and DPO. The evidence is clear that the company fired her before she was able to consult with her attorney about whether the Response Letter was to be considered a whistle-blowing complaint. Judge Dennis writes:

> The panel opinion incorrectly and improperly finds de novo that "Douglas...specifically instructed O'Neill not to treat the Letter as a whistle-blower complaint." *Douglas*, 144 F.3d at 373. The panel's conclusion that Douglas's response letter did not constitute protected participation is thus based on a faulty factual premise. More important, the panel overlooks that "the focus is not on whether the employee intends to follow through with filing the charge, but rather on whether the employer's dicision to discharge was motivated by an improper desire to retaliate against an employee for pursuing rights granted by the Act." *Polk v. Yellow Freight Syst., Inc.*, 801 F.2d 190, 200 (6th Cir. 1981) (an employee's visit to a Civil Rights Commission to inquire about rights under the Act is a protected activity); see also *Gifford v. Atchison, Topeka & Santa Fe Ry.*, 685 F.2d 1149, 1156 n.3 (9th Cir. 1982) ("no legal distinction...between...filing of a charge...and threatening to file a charge.").

Whether or not the Response Letter was considered a whistle-blowing complaint, it was a complaint of retaliation, and race and gender discrimination.

It is most significant that **the trial court did not find that Douglas violated any ethical rule.** In fact, the district court judge stated:

> With respect to Bell South,...most of her explanation dealt with generic steps she took in handling the

> matter, with minimal disclosure of any substantive information. Likewise, her discussion of "Becky R." and "Brian S." did not discloses any substantive in-house information. It also related directly to the plaintiff's complaint that she was the victim of disparate treatment in her performance evaluation."

Petition, Appendix B-4. Therefore, the evidence was sufficient to support the finding of the jury that DPO and Poindexter had retaliated against Douglas for her engaging in activities protected by Title VII..

II. The Fifth Circuit Opinion Abandons the Balancing Test Used by the Majority of the Circuits.

The majority of the circuits use a balancing test when deciding whether a plaintiff's conduct is "protected activity" under Title VII. The Fifth Circuit cites this test in the panel opinion: "The employer's right to run his business must be balanced against the rights of the employee to express his grievances and promote his own welfare." Petition, Appendix A-22. The employer's interest wins out when the conduct is "so inappropriate as to justify the curtailment of statutorily-afforded relief." *Id.* at A-21-22.

The Fifth Circuit abandoned this test, in this case and in the future, when the plaintiff is an in-house attorney who has revealed **minimal** information about her client. While DPO states that the panel *did* use the balancing test in the instant case (p. 10), it is clear that if the employer's right to run his business was seriously weighed by the court against the right of Douglas to express her grievances, Douglas's rights would have prevailed.

Judge Dennis writes about the audit interview: "Significantly, no harm whatsoever to DPO resulted from

Douglas's statement. O'Neill and JoAnn Rochon, two DOE team members who testified at the trial, could not even recall that Douglas had said anything about a class action, human resources leeks, specific employees or specific employee complaints or cases." Dennis Dissent, p. 7. Judge Dennis further states that:

> Based on the evidence introduced at trial, the jury reasonably could have found that DPO's "ethical" reason for terminating Douglas's employment was in fact a pretext because: (1) The statements in Douglas's June 24, 1994 response that DPO proffered as its reason for discharging Douglas **were not in fact disclosures to DOE because DOE already had the information and it was insignificant anyway;** the jury reasonably could have disbelieved DPO because of this alone;...

Dennis Dissent, p. 28 (emphasis added). The employer's right to run its business was not jeopardized in any way. No harm came of Douglas's communication with DOE.

The other circuit cases which use the balancing test all include plaintiffs whose conduct was much more egregious than Douglas's. In both *Laughlin v. Metropolitan Washington Airports Authority,* 149 F.3d 756 (4th Cir. 1998), and *O'Day v. McDonnell Douglas Helicopter Co.,* 79 F.3d 756 (9th Cir. 1996), the plaintiffs stole sensitive company documents. In *Hochstadt v. Worcester Foundation for Experimental Biology,* 545 F.2d 222 (1st Cir. 1976), the plaintiff was extremely hostile and disruptive in the workplace, engaging in public, bitter exchanges with her superiors. DPO attempts to compare these activities with that of Douglas, stating (p. 9 of Respondents' Brief in Opposition) that "they pale in comparison to Douglas' activities..." This argument is disingenuous considering the contract language that waived

DPO's rights of confidentiality and privilege with respect to Douglas's performance Evaluation and her Response letter.

DPO also asserts that the panel did not add a third prong to the test when it comes to lawyers (p. 9). However, the language in the panel opinion is as follows:

> [W]hen an **attorney's Title VII right** to oppose her employer-client's allegedly discriminatory practices by disclosing confidential information contrary to the ethical obligations of the profession is balanced against her **employer-client's rights** to ethical representation and the **profession's interest** in assuring the ethical conduct of its members, the employer's and the profession's interests must prevail.

Petition, Appendix A-28. The panel adds the interest of the entire legal profession to the equation, on the side of the employer. It is hard to conceive of a situation where the employee's interest would outweigh the other two. To summarize the Fifth Circuit's manipulation of the balancing test:

> [T]he panel transformed the balancing test into four overlapping hard-and-fast rules of law: (1) An attorney-employee's opposition to an unlawful employment practice that involves a breach of a state ethical rule imposing a duty for the benefit of a client is unprotected under Title VII; (ii) The magnitude of the attorney's transgression and the risk of harm created are not relevant; "any betrayal of a client's confidences that breaches the ethical duties of the attorney places that conduct outside Title VII's protection [against retaliatory discrimination by the employer]" *Id.* at 376; (iii) If the attorney-employee's opposition conduct invoves a violation of a professional ethical rule, "the employer is insulated from liability

> irrespective of whether it took adverse employment action because the conduct constituted a breach or because the conduct was in opposition to discriminatory employment practices." *Id.* at 377 n.16; (iv) Consequently, the employer in such a case is entitled as a matter of law to a judgment as a matter of law dismissing the employee's case. *Id.* at 376.

Dennis Dissent, p. 26.

This transformation is so far away from the normal balancing test used by the majority of the circuits, it is necessary for this court 1) to decide how the balancing test can be applied in a manner consistent with the *McDonnell Douglas-Burdine-Hicks* burden of proof analysis, 2) to articulate exactly what interests should be considered in the balancing test, and 3) to decide whether this test should be completely disregarded for attorneys who reveals any employment-related information while opposing an unlawful employment practice.

III. Conclusion

For all of the foregoing reasons, Petitioner Kordice M. Douglas, urges this Honorable Court grant her application for writ of certiorari; that the Clerk of the U.S. Fifth Circuit Court of Appeals be requested to certify and transmit the record in No. 96-30883, "Kordice M. Douglas v. DynMcDermott Petroleum Operations Company and John Poindexter", that a briefing schedule be set, and that after all due proceedings are had herein, the judgment of the U.S. Fifth Circuit of Appeals be reversed and the jury verdict and judgment of the district court be reinstated.

Respectfully submitted,

VICTOR R. FARRUGIA #19324
A PROFESSIONAL LAW CORP.
228 St. Charles Avenue
Suite 1028
New Orleans, LA 70130-2610
(504) 525-0250

Attorney for Douglas,
Kordice M. Douglas